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BEFORE THE ARIZONA CORPORATION COMMISSION

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Commissioner

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Commissioner

Arizona Corporation Commission
DOCKETED

MAR 14 2003

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In the Matter of Qwest Corporation's
Compliance With Section 252(e) of the
Telecommunications Act of 1996

Docket No: RT-00000F-02-0271

ESCHELON TELECOM OF ARIZONA INC.'S
PREHEARNG STATEMENT

INTRODUCTION

Eschelon Telecom of Arizona Inc. (Eschelon) files these comments to clarify the position and status of Eschelon in this proceeding. Specifically, Eschelon asserts that it is not subject to the imposition of penalties in this matter and any order resulting from this proceeding should not include the imposition of penalties against Eschelon. Eschelon is not using this opportunity to argue that it should escape any consequences of its having

1 been a party to the unfiled agreements. Eschelon regrets its participation in the
2 agreements and admits that, were it able to do it over, it would have approached its
3 relationship and difficulties with Qwest much differently. However, this proceeding is not
4 the proper one to explore such issues as to Eschelon. Rather, this proceeding is an
5 investigation of Qwest and a determination of what remedies should be imposed on Qwest.
6

7 **I. QWEST'S, NOT ESCHELON'S, BEHAVIOR IS THE SUBJECT OF THIS**
8 **DOCKET.**

9 The Arizona Corporation Commission's November 7, 2002 Procedural Order (the
10 "Order") established the scope of this hearing as follows:

11 The Section 252 issues concern whether Qwest violated its obligation to file
12 certain agreements with this Commission and if it did, what remedies are
13 appropriate. The scope of the hearing in the Section 252(e) proceeding will
14 determine when Qwest should file agreements with CLECs for Commission
15 approval, why Qwest failed to file certain agreements, whether Qwest knew or
16 should have known the appropriate criteria at the time it failed to file the
17 agreements, which agreement should be filed under the standard and whether
18 Qwest should be subject to monetary and/or non-monetary penalties if it violated
19 the standard. In addition, the Commission should determine if Qwest's conduct
20 violated any other law, Commission Order or rule. (Emphasis added)

21 Order, p. 5, at 10-17.

22 Consistent with this scope, Qwest was directed to file direct testimony and was
23 allowed to file rebuttal testimony in response to Staff and intervenor testimony. Qwest is
24 the focus of this proceeding. There has been no order for an investigation of Eschelon, nor
25 any notice that Eschelon's rights, privileges and property would be at risk in this
26 proceeding.

1 **II. PARTY RECOMMENDATIONS WOULD PENALIZE ESCHELON.**

2 Despite an explicit Commission statement limiting the scope of this proceeding to
3 remedies against Qwest, both the Staff's and RUCO's pre-filed testimony recommend
4 penalties against Eschelon, such as being excluded from receiving discounts that its
5 competitors will receive in the future and payment of a \$100,000 contribution to a fund.
6 For the Commission to adopt remedies in this proceeding against Eschelon would violate
7 due process under both state and federal law. Moreover, the particular penalties proposed
8 would violate the anti-discrimination provisions of the federal Telecommunications Act of
9 1996 and A.R.S. § 40-334.
10

11
12 Eschelon urges the Commission to reject those portions of RUCO's and Staff's
13 testimony recommending penalties against Eschelon. If, based on this record, the
14 Commission wants to consider penalties against Eschelon, it should be the focus of a
15 separate proceeding.
16

17 Specifically, the Eschelon penalties recommended by Staff are:

- 18 1. Eschelon would be prohibited from collecting the cash payments
19 given to its competitors totaling 10% of the purchases of Section 251(b) or (c) services and
20 intrastate access from Qwest in Arizona during the time period January 1, 2001 through
21 June 30, 2002, a period of 18 months. Direct Testimony of Marta Kalleberg, pp. 90-91.
22 Eschelon does not object to the concept of its competitors receiving retroactively the
23 benefits of Eschelon's agreements with Qwest. The Commission should note, however,
24 that Eschelon incurred costs and gave up claims in exchange for these benefits that its
25
26

1 competitors will not be required to incur or give up. Moreover, Eschelon was subject to
2 the agreements from November 15, 2000 to March 1, 2002, a period of less than 16
3 months, not 18 months.

4
5 2. Eschelon would be prohibited from receiving a credit totaling 10%
6 of its purchases of Section 251 (b) or (c) and intrastate access for 18 months following the
7 date of the decision in this matter. *Id.* at pp. 91-92. Based upon current purchases, and not
8 taking into account potential growth, Eschelon estimates that this proposal would cost
9 Eschelon in excess of \$600,000. This would constitute a huge, unjustified penalty on
10 Eschelon that would exceed that imposed on Qwest on a comparative basis. Excluding
11 Eschelon from a future discount available to all other CLECs is discriminatory, anti-
12 competitive, contrary to the Telecommunications Act of 1996 and A.R.S. § 40-334.
13

14 The Eschelon penalties recommended by RUCO are:
15

16 1. Eschelon would be prohibited from receiving a 10 percent discount to be
17 available to all other CLECs (except McLeod) for a period of from 3 to 5 years from the
18 date of the order. Direct Testimony of Ben Johnson, Ph.D. at p. 22, lines 16-18. Eschelon
19 estimates based on current levels of purchases, that this proposal could penalize Eschelon
20 in excess of \$2 million for the Arizona jurisdiction. This is a severe and unjustified
21 penalty that would cripple Eschelon from competing in Arizona for the foreseeable future.
22 Excluding Eschelon from a discount available to all other CLECs for a future period of
23 three to five years is discriminatory, anti-competitive and contrary to the
24 Telecommunications Act of 1996, and A.R.S. § 40-334..
25
26

2. Eschelon should pay no less than \$100,000 into a fund to facilitate arbitrations. *Id.* at p. 48, lines 10-14. Imposition of such a penalty is not justified, is without statutory support and violates Eschelon's due process rights.

II. ESCHELON'S COMPETITORS WILL GET ALL OF THE BENEFITS OF THE UNFILED AGREEMENTS FOR PAST PERIODS, WITHOUT ANY OF THE COSTS.

While Eschelon understands RUCO's and Staff's desire to give Eschelon's competitors financial benefits equal to those Eschelon received, it should be recognized that the recommendations concerning 10% discounts for past purchases in themselves provide a large benefit to other CLECs that exceed the benefit that Eschelon obtained from the agreements. For example, the 10% discount proposal appears to be predicated upon the assumption that the UNE-Star agreement that was associated with the unfiled agreements was fairly priced without any discount, and that the discount represents, in toto, an undue advantage denied to other competitors. However, the economics of the unfiled agreements can only be understood when considered in tandem with the filed UNE-Star amendment. Eschelon incurred substantial costs in implementing, billing and converting from UNE-Star to UNE-P. Since the proposed remedies would not require competitors to buy UNE-Star, nor meet any of the other conditions imposed upon Eschelon as a part of those agreements, this remedy gives Eschelon's competitors much greater an advantage than Eschelon ever received.

In addition to the excessive price Eschelon paid for UNE-Star and the high costs of implementing UNE-Star, Eschelon also had to pay for three Carrier Access Billing (CAB)

1 audits to get the access records it was entitled to under the agreements in order to obtain
2 the access credits that would be made available to CLECs under the Staff and RUCO
3 proposals. These other carriers will not be required to pay for these audits, which cost
4 Eschelon approximately \$80,000 for Arizona.
5

6 Finally, while Eschelon did receive a lump sum payment as a part of the March 1,
7 2002 Settlement Agreement, it had to waive any and all existing claims against Qwest
8 arising out of disputes concerning service credits, CABS, UNE-E line and UNE-E Non-
9 Recurring Charge credits and disputes concerning claims of anti-competitive conduct and
10 unfair competition.¹ Thus, Eschelon gave up significant potential claims relating to past
11 periods, in exchange for the payment, something no other CLEC would apparently have to
12 do under the Staff or RUCO proposals.
13
14

15 **IV. DISQUALIFICATION FOR FUTURE DISCOUNTS IS NOT JUSTIFIED.**

16 In addition to remedies relating to past periods, RUCO and Staff would impose
17 serious and substantial future consequences on Eschelon (and McLeod) that are not
18 imposed upon other CLECs. The most serious of the consequences is the recommendation
19 that Eschelon not be eligible to obtain Qwest's services at the same price as its competitors
20 in the future. Eschelon strongly opposes such remedies. This would constitute a penalty
21 on Eschelon that would do great harm to Eschelon's ability to compete and would clearly
22 result in discriminatory rates.
23
24

25 _____
26 ¹ See, Settlement Agreement, March 1, 2002, Section 2(a).

1 While Eschelon did receive a lump sum payment as part of the agreement to
2 terminate the unfilled agreements, this was not a payment for the present value of future
3 benefits. In fact, the vast majority of the payment was a "catch-up" payment to pay for the
4 unpaid credits for the period of September, 2001 through March, 2002, or related to other
5 ongoing disputes between Eschelon and Qwest as of March 1, 2002, and bore no relation
6 to the agreements in question.² Indeed, only \$359,182 of that amount is properly allocated
7 to Arizona as present value payments under the Settlement Agreement and that, after
8 appropriate adjustments, only \$190,000 can reasonably be characterized as representing
9 foregone future payments for Arizona purchases.
10

11
12 **V. ESCHELON'S CIRCUMSTANCES SHOULD BE CONSIDERED IN THE**
13 **IMPOSITION OF A PENALTY.**

14 If Eschelon were to have a hearing on possible penalties, it would show to the
15 Commission the circumstances surrounding its involvement in the unfilled agreements and
16 the factors which would tend to mitigate the degree that it should be punished for its role
17 in such agreements.
18

19 As RUCO witness Ben Johnson states in his testimony "ILECs often have such
20 substantial market power that, if unchecked, they can basically bully CLECs into
21 accepting terms and conditions that are contrary to the best interests of the CLEC, and
22 contrary to the public interest." Testimony of Ben Johnson, Ph.D., p. 14, lines 7-18.
23 Johnson further testifies that Qwest used its monopoly power "to force certain CLECs into
24 agreements they would otherwise not have entered into..." *Id.* at p. 17, lines 4-7.
25

26

² *Id.*

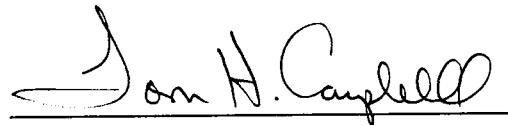
1 Similarly, in this case, Qwest imposed certain demands on Eschelon at a time when
2 Eschelon faced the problems of poor service by a sole supplier (*i.e.* Qwest) and was
3 struggling to establish itself in the market. *See*, Staff Ex. S-7, Deposition of Richard A.
4 Smith, p.136, lines 13-22; Staff Ex. S-13; and Staff Ex. S-8, Affidavit of F. Lynne Powers.
5 Not only was Qwest uniquely positioned to act as it did because of its monopoly power,
6 but the Act imposed the filing requirement solely on Qwest.
7

8
9 **CONCLUSION**

10 Eschelon has been cooperative with this investigation and is amenable to bringing
11 this matter to an end. However, it cannot agree to be subject to the substantial and
12 unwarranted penalties that would be imposed upon it under the recommendations of
13 RUCO and Staff, especially in a proceeding where it was not the subject of the
14 investigation. Eschelon urges the Commission to reject the punitive recommendations
15 against Eschelon.
16

17 RESPECTFULLY SUBMITTED this 14th day of March, 2003.
18

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20 

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